Supreme Court, U.S.
FILED
MAY 9 2003
OFFICE OF THE CLERK

(2)

No. 02-1507

In the Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. RYAN, ESQ.
Counsel of Record

CASASSA AND RYAN
459 LAFAYETTE ROAD
HAMPTON, NH 03842
(603) 926-6336

Counsel for Respondent

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

12 pp

RESTATEMENT OF QUESTIONS PRESENTED

Where a State Court invalidated a municipal land use ordinance due to a procedural defect is every permit denial made under the ordinance prior to the invalidation an unconstitutional taking of property.

TABLE OF CONTENTS

PAGE

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REQUEST TO DENY CERTIORARI 1

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. Decision Below Does Not Present a Conflict 3

II. No "Taking" Occurred 6

III. The Decision Below Was Correct 7

CONCLUSION 7

TABLE OF AUTHORITIES

PAGE

Agins v. City of Tiburon, 447 U.S. 254 (1980) 4

Amey v. Pittsbury School District,
95 NH 386, 64 A.2d 1 (1949) 4

Barcomb v. Herman,
116 NH 318, 358 A.2d 400 (1976) 4

City of Monterey v. Del Monte Dunes,
526 U.S. 687 (1999) 4-5

Cumberland Farms, Inc. v. Town of Groton,
719 A.2d 465 (Conn. 1998) 5

Eberle v. Dane County Board of Adjustment,
595 N.W.2d 730 (Wis. 1999) 5

Hecker v. McKernan,
105 NH 195, 186 A.2d 38 (1963) 4

Nollan v. California Coastal Comm'n.,
483 U.S. 825 (1987) 4, 6

Penn Central Transp. Co. v. City of New York,
483 U.S. 104 (1978) 6

Tahoe Sierra Preservation Council v.
Tahoe Regional Planning Agency,
535 U.S. 302 (2002) 5

Tahoe Sierra Preservation Council v.
Tahoe Regional Planning Agency,
216 F.3d 764 (9th Cir. 2000,
aff'd, 535 U.S. 302 (2002) 5

REQUEST TO DENY CERTIORARI

Respondent Town of Fremont requests that this Court deny the Petition for Certiorari ("Pet") filed by Henry Torromeo and MDR Corporation seeking review of the decision of the Supreme Court of New Hampshire entered in this case on December 13, 2002.

COUNTER STATEMENT OF THE CASE

In March 1999 the Town of Fremont enacted a Growth Control Ordinance (Pet. App. at K-45, 52). In August of 1999 the Plaintiff, MDR filed its action alleging that the denial of building permits applied for by MDR was improper and challenged the validity of the Town's Growth Control Ordinance. Similarly, the Plaintiff Torromeo also brought an action contesting the legality of the denial of building permits. On December 27, 1999, the New Hampshire Superior Court (Murphy J.), issued its decision in the MDR case. (Pet. App. at G-28). The Court held that at the Fremont Annual Town Meeting in 1987, the vote taken at that meeting did not properly authorize the Planning Board of the Town of Fremont to prepare a Capital Improvement Program under RSA 674:5 (Pet. App. at 41). The Court also held that as a result of the defective 1987 vote, the statutory requirement under RSA 674:22 (Pet. App. at 42) requiring a Capital Improvement Program as a basis for a Growth Control ordinance had not been met despite the actual existence of Capital Improvement programs since 1987, and invalidated the Town's 1999 Growth Control Ordinance. The Town seasonably filed its appeal of that decision (New Hampshire Supreme Court Case #2000-100). Prior to the Court's ruling on that appeal, the Torromeo case was heard on January 27, 2002 with an order issued on 1/31/00 (Pet. App. at H-32). That case was decided on different

grounds than the MDR case, in favor of the Plaintiff, and the Town immediately issued the building permits requested by the Plaintiff in February of 2000. On June 26, 2000 the New Hampshire Supreme Court issued its Order declining the appeal filed by the Town in the first MDR case (Pet. App. at F-27). Immediately thereafter the Town issued the building permits requested by the Plaintiff MDR. Thus, in both instances the building permits were not withheld beyond the judicial disposition of those cases, and the Petitioners' assertion or implication that the Town applied an Ordinance after it was declared illegal is erroneous (Pet. at 2).

The present cases were filed on March 21, 2000, were thereafter consolidated for trial, with a decision awarding damages to the Petitioners issued on September 21, 2001 (Pet. App. at B-7).

The Town filed its appeal which resulted in a reversal of the damage award (Pet. App. at A-1). In essence the New Hampshire Supreme Court held that absent any claim or proof that the Growth Control Ordinance at issue was unconstitutional, inverse condemnation damages representing the loss of monetary value during the period of the enforcement of the Ordinance, could not be awarded. Rather, the Court held that since the defect in the Ordinance which led to the finding that it could not be enforced was procedural in nature, the Petitioners remedy was the injunctive equitable remedy of the issuance of the building permits (which the Town had performed as stated above). Therefore, this is <u>not</u> a case where the Growth Control Ordinance was challenged on constitutional grounds or a case where once having been told that the Ordinance was unenforceable, the Town nevertheless continued to apply the Ordinance.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Present a Conflict.

Contrary to the assertions made by the Petitioners, the New Hampshire Supreme Court did not misapply established constitutional precedent. As noted by the New Hampshire Supreme Court in its decision, the Ordinance in question was not invalidated by reasons related to any constitutional provisions, but rather by reason of a procedural defect (Pet. App. at A 5-6).

The Petitioners do not dispute that the Town had a legitimate interest in controlling growth as authorized by that statute (Pet. at 2). The Town's Growth Control Ordinance was not challenged as failing to pursue that interest, or was otherwise arbitrary or unreasonable. The focus of the Petitioners' assertions in the cases which proceeded this case related to the alleged lack of certain procedures and proper language at a 1987 Town Meeting which had attempted to comply with the State statute related to the formulation and adoption of a Capital Improvement Program by a Planning Board which is one of the requisites to a Growth Control Ordinance under RSA 674:22 (Pet. App. at 42). In 1999 the Petitioner MDR alleged that the 1987 Town Meeting was defective and that the Capital Improvement Program then adopted by the Planning Board as of 1999 was not properly authorized.

The New Hampshire Superior court found that a defect did exist and also ruled that as a consequence the Growth Control Ordinance (Pet. at G-28) was invalid. This decision was appealed and it was not until the New Hampshire Supreme Court rendered its decision (Pet. App. at

F-27), that the determination that a defect did exist become final.

The defect which led to the invalidation of the Growth control Ordinance bore no relation to the substance of the Ordinance itself and was confirmed as procedural error only (Pet. App. at 18). There is a major difference between an ordinance which is found to be unreasonable, arbitrary and therefore an unconstitutional exercise of the police power, and an ordinance which is found invalid only by reason of procedural irregularities related to a component of the enabling statute (RSA 674:22 - Pet. App. at 42). Courts are routinely called upon to determine whether procedural requirements related to the enactment of land use ordinances have been complied with. See e.g. Barcomb v. Herman, 116 NH 318, 358 A.2d 400 (1976); Amey v. Pittsburg School District, 95 NH 386, 64 A.2d 1 (1949); Hecker v. McKernan, 105 NH 195 186 A.2d 38 (1963).

In cases involving invalidation of a land use ordinance by reason of a procedural defect, such as in this case, it cannot be found that the Town subjected itself to liability for inverse condemnation damages where it enforced an Ordinance prior to the time that the Courts ruled on the procedural legal issue. In Agins v. City of Tiburon, 447 U.S. 254 (1980), the Court observed that local growth control laws like the Fremont Ordinance substantially advanced legitimate government interests in protecting citizens against "the ill effects of urbanization" and the "premature and unnecessary conversion of open-space land to urban uses" Id. at 261. Nothing in this Court's taking juris-prudence suggests that a procedural defect in the adoption of such a growth control ordinance undermines those interests or gives rise to takings liability. See Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) See also, City of Monterey v. Del Monte

Dunes, 526 U.S. 687 (1999); Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). The Petitioners theory that every invalidation of a land use ordinance constitutes grounds for a takings claim where a permit was denied during the enforcement period, is unprecedented.

Consequently, the Petitioners' assertion that the Ordinance did not advance a legitimate state interest is erroneous The Town had every right to defend against the procedural issue raised by the Petitioner MDR and seek a Court ruling as to whether the State statutes related to the adoption of a Capital Improvement program had been complied with, and to apply the Ordinance to the Petitioner prior to the Courts' rulings on the issue.

Furthermore, the Petitioners attempt to discern a "conflict" in state cases also fails. Petitioners fail to cite any case that adopts the Petitioners allegation that a routine, procedural defect in a land use ordinance automatically gives rise to a federal constitutional takings claim by anyone whose application for a permit was denied under the ordinance prior to its invalidation by a later Court decision. The cases cited by the Petitioners (Pet. at 26-27) to show a purported split of authority Cumberland Farms, Inc. v. Town of Groton, 719 A.2d 465 (Conn. 1998), Eberle v. Dane County Board of Adjustment, 595 N.W. 2d 730 (Wis. 1999), and Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000 aff'd, 535 US 302 (2002), all stand only for the unremarkable proposition that compensation is the appropriate constitutional remedy for a taking, and that a compensable temporary taking occurs where the government rescinds an action that otherwise would be a permanent taking. Nothing in those cases supports the Petitioners novel theory presented in their Petition.

Furthermore, the Petitioners reliance on Nollan (Pet. at 13), is misplaced. Nollan involved a permit condition that required the landowner to dedicate land to the public, and it holds only that such compelled dedications warrant careful scrutiny because they present a heightened risk that the government might be sidestepping its constitutional obligation to acquire land upon the payment of just compensation. Nollan provides no support for Petitioners' argument that a permit denial under a procedurally defective land use ordinance engenders an automatic takings claim.

Finally, the Petitioners reliance on Penn Central Transp. Co. v. City of New York, U.S. 104 (1978), is misplaced. The Petitioners fail to cite the Penn Central case or its holding in its Supreme Court proceedings; therefore any argument based on that case has been waived and is not properly before this Court. In addition the Petitioners fail to cite a single case from the U.S. Supreme Court or any other Court in which the kind of procedural defect found in this case was given any significant weight in takings analysis under Penn Central's "character of government action" prong or test.

II. No "Taking" Occurred

The Petitioners assert that a "taking" occurred under the 5th Amendment to the US Constitution by the application of an illegal ordinance (Pet. at 21). The period of the alleged "taking" related to the time between the enactment of the Ordinance (March 1999), to the dates when the Town issued the requested building permits. During that period the contest over the whether the Ordinance was valid due to the alleged procedural error discussed in Section I above was in process. Thus, the issue of a taking could not arise until after the Court's had ruled on that issue. As pointed out

previously, immediately after the new Hampshire Superior Court decisions became final, the Town issued the requested permits.

III. The Decision Below Was Correct

The New Hampshire Supreme Court's reasons for reversal of the damages awards to the Petitioners was grounded in solid fundamental constitutional law principles. The Ordinance must be proven to be arbitrary or unreasonable, there must be a taking, and the constitutionality of the regulations must be challenged (Pet. App. at A-5). None of these elements is present in this case.

CONCLUSION

For the above cited reasons, the Petition should be denied.

TOWN OF FREMONT
By its Attorneys
Casassa and Ryan

John J. Ryan
CASASSA AND RYAN
459 Lafayette Road
Hampton, NH 03842
(603) 926-6336